IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr.A No.291 of 1993

Decided on : December 12, 2007

State of H.P. **…Appellant.**

Versus

Subhash Chand and others **…Respondents.**

Coram

The Hon'ble Mr. Justice Surjit Singh, Judge.

The Hon'ble Mr. Justice Surinder Singh, Judge.

Whether approved for reporting?

For the Appellant : Mr. D.S. Nainta, Deputy Advocate General.

For the Respondents : Mr. R.K. Gautam, Senior Advocate, with Mr. Naveen Bhardwaj, Advocate.

Surjit Singh, Judge(Oral)

Respondents, who were charged with and tried for an offence, punishable under Section 376 read with Section 34 IPC, stand acquitted by the trial Court and, therefore, the State has filed this appeal seeking the reversal of the judgment of acquittal and for convicting and sentencing the respondents for the aforesaid offence.

2. On 2nd July, 1991, a report was lodged with the police by the prosecutrix, who went to the Police Station accompanied by her father PW-5 Dhani Ram and sister Sumna, that on 27th June, 1991, when she alongwith her two elder sisters Sunia and Sumna was extinguishing a forest fire near her house, the three respondents gagged her with her own *Dupatta*, tied her hands on her back and physically carried her to a *Nullah*, where respondent Subhash Chand committed rape on her, while the remaining two respondents stood guard at some distance.

Whether reporters of the local papers may be allowed to see the judgment?

3. Trial Court has acquitted the respondents holding that there was unexplained long delay of four days in reporting the matter to the police and it appeared that the prosecutrix was a consenting party and her age being more than 16 years, when the incident took place, she was competent to consent for the sexual act.

4. We have heard the learned Deputy Advocate General and gone through the record.

5. Before we proceed to discuss the evidence, we would like to point out that the trial Court has given the verdict of acquittal in favour of the respondents without even noticing the evidence of the prosecution, leave alone appreciating and analyzing it.

6. At one stage, we were thinking of remanding the case to the trial Court with the direction to decide the same afresh by examining and analyzing the evidence of the prosecution, but considering that the case is very old, we thought of deciding it on merits, at our own level.

7. No doubt, the prosecutrix, while in the witness box as PW-4, testified that she was physically carried to a *Nulla* by the three respondents and then subjected to rape by respondent Subhash Chand, but there are several contradictions in the evidence of the prosecution, which indicate that the story of rape may not be true. To the police, vide FIR Ex. P-14, it was reported that the prosecutrix was physically lifted and carried from the courtyard of her house, when she was returning from the site of the fire, to refill the bucket with water, but while in the witness box as PW-4, she stated that she was lifted and carried away from the courtyard, after she came out of her house, with a bucket filled with water. The prosecutrix testified that she was not exposed to sexual intercourse prior to the incident but the doctor,

who conducted the medico legal examination, namely PW-1 Dr. P. Singh, testified that she was used to sexual intercourse.

8. Evidence of the prosecution with regard to the age of the prosecutrix does suggest that she was past the consenting age of 16 years, when the incident took place. Her father, PW-5 Dhani Ram, while in the witness-box, stated that his marriage took place in the year 1964, his first daughter was born 3-4 years after the marriage, second daughter was born 14 months later and third one, the prosecutrix, was born 3-4 years after the birth of the second daughter. That means the prosecutrix was born around nine years after the marriage of her father PW-5 Dhani Ram. In other words, her year of birth should be 1973 or at the most 1974. The incident took place in the year 1991. Therefore, she was more than 16 years of age at the time of the alleged occurrence.

9. It appears from the evidence on record that no attempt was made by the prosecutrix or her sisters to inform their father about the alleged incident. The incident had taken place on 27th June, 1991. Father of the prosecutrix was working as a labourer in slate mines at Khaniyara during those days. Even though, PW-6 Sunita testified (in the examination-in-chief) that she had gone to inform her father about the incident on the next following day, in her cross-examination, she admitted that to the police she had stated that it was her sister Sumna, who had gone, on the next following day, to inform her father. No explanation for this contradiction has been offered.

10. Again, PW-6 Sunita says that she was told by the prosecutrix, her sister, that she raised cries of *Bachao-Bachao* when the respondents committed the crime, but the prosecutrix herself says

that she could not raise any cries, as her mouth had been gagged with her own *Dupatta* by the respondents.

11. There is long delay of five days in reporting the matter to the police. The incident allegedly took place on the night intervening 27th & 28th June, 1991, but the matter was reported to the police on 2nd July, 1991. Explanation offered by the father of the prosecutrix, PW-5 Dhani Ram, is that even though he has been informed of the incident on 27th June, 1991 by his daughter Sunita, who came to his place of work at Khaniyara, he could not go to the Police Station immediately, as he had no money with him and the contractor with whom he was working those days and from whom he could borrow the money, was also not available.

12. In view of the abovestated position, we feel that the judgment of acquittal passed by the trial Court, does not call for interference. Hence, the appeal is dismissed.

(Surjit Singh), J

December 12, 2007(sd) **(Surinder Singh), J**